80-1376

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In the

Supreme Court of the United States

October Term 1980

HELEN LOUISE BOWLING CORROS,
Administratrix of the Estate
of Ricardo Abello Corros,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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January 20, 1981

QUESTIONS PRESENTED

1. Is a dike, or breakwater, built pursuant to Congressional authorization and placed in the navigable waters of the United States an "obstruction" within the purview of 14 U.S.C. §86? If so, does this statute impose a duty upon the United States (here, the Coast Guard) to properly mark the dike, or breakwater, once the United States exercises its discretion to mark the dike, or breakwater? Therefore, assuming coverage under 14 U.S.C. §86 and a duty imposed thereby, was the United States liable for the death of the Petitioner's decedent and for damage to the decedent's boat and motor due to the negligence of the Coast Guard and the breach of this duty in not properly marking the dike, or breakwater?

2. In the absence of coverage under 14 U.S.C. §86, and/or the absence of a duty imposed thereby, was the United States liable for the death of the Petitioner's decedent and for damage to the decedent's boat and motor due to the negligence of the Coast Guard and breach of its duty in not properly marking the dike, or breakwater, under the principles of *Indian Towing Co. v. United States*, 350 U.S. 61 (1955)?

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The language of the Circuit Court decision itself suggests that its holding is contrary to "the literal words of" 14 U.S.C. §86. Such an important question of federal law has not been decided by the Supreme Court and should be.

II.

The decision of the Fourth Circuit Court of Appeals conflicts with the "Good Samaritan" principle of *Indian Towing Company v. United States.*

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OPINIONS BELOW

The Opinion of the Fourth Circuit Court of Appeals is reported at 630 F.2d 224 and is included in the Appendix beginning at page A-1. The Opinion of the District Court for the District of South Carolina is reported at 439 F. Supp. 592 and is included in the Appendix at page A-13 . The Order denying the Petition for Rehearing En Banc is included in the Appendix at page A-39 .

JURISDICTION

The Judgment of the Court of Appeals was entered on September 10, 1980. A Petition for Rehearing, with a suggestion that the case be Reheard En Banc, was denied on October 22, 1980, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is a dike, or breakwater, built pursuant to Congressional authorization and placed in the navigable waters of the United States an "obstruction" within the purview of 14 U.S.C. §86? If so, does this statute impose a duty upon the United States (here, the Coast Guard) to properly mark the dike, or breakwater, once the United States exercises its discretion to mark the dike, or breakwater? Therefore, assuming coverage under 14 U.S.C. §86 and a duty imposed thereby, was the United States liable for the death of the Petitioner's decedent and for damage to the decedent's boat and motor due to the negligence of the Coast Guard and the breach of this duty in not properly marking the dike, or breakwater?

2. In the absence of coverage under 14 U.S.C. §86, and/or the absence of a duty imposed thereby, was the United States liable for the death of the Petitioner's decedent and for damage to the decedent's boat and motor due to the negligence of the Coast Guard and

breach of its duty in not properly marking the dike, or breakwater, under the principles of *Indian Towing Co. v. United States*, 350 U.S. 61 (1955)?

STATUTES INVOLVED

The statutes involved are 46 U.S.C. §742, 14 U.S.C. §§2, 81, and 86. These statutes are included in the Appendix at page A-36 .

STATEMENT OF THE CASE

This suit was brought against the United States under the Suits in Admiralty Act, 46 U.S.C. §741, et seq, for the wrongful death of the Petitioner's decedent and for damage to the decedent's boat and motor after the boat, a 15' pleasure craft, struck a dike, or breakwater, in the Cooper River at the harbor in Charleston, South Carolina. The pleasure boat, operated by the decedent with two passengers aboard, was powered by an 85 horsepower motor.

The dike was Congressionally authorized[1] and forms part of a breakwater system whose purpose was to increase the water velocity in the Cooper River channel to reduce shoaling in that channel caused by silting from upstream activities.

Construction of the dike was completed in February 1959. The dike itself is made of sheet steel and is 1,100 feet long, running to the southwest into the Cooper River from nearby Daniel Island. The channelward end of the dike is anchored by a terminal cell, a sheet steel pile cylinder 23 feet in diameter, filled with crushed rock.

In April 1959, three months after the construction of the dike and terminal cell, the Coast Guard placed a light atop the channelward portion of the terminal cell. The

[1] River and Harbor Act of September 3, 1954, 68 Stat. 1248.

light was an all-around white light which flashed once every four seconds. The light was flashing on the evening of the collision.

There were no other markings of any kind, or other lights, along the length of the dike or upon the cylinder wall of the terminal cell. The tide was such at the time of the collision that the top of both the cell and the dike wall were about two feet above the water's surface. Both the dike's wall and its terminal cell were dark with a blackish hue.

While running from half to full speed, on the evening of September 29, 1973, when it was almost completely dark, the boat struck the dike, or breakwater, at a point along its length about 280 feet from the dike's channel end. With the decedent at the helm looking straight ahead and the Corros boat running flat in the water the collision occurred.

The District Court assessed proportional fault and held that the United States negligently abused its discretion in failing to take extra care to adequately and properly mark and/or light this particular dike. In reaching its holding the District Court found that both the terminal cell and the wall, being about two feet above the water's surface, were "not visible to an approaching boatman".[2] Relying upon testimony from boating experiments both from the Corros Estate and the United States the District Court concluded:

> "... this court is persuaded that very little of the dike rose above the water level at the time of the collision, and that whatever part rose above the water level was hardle visible under the combined factors of the darkness, the competing light systems, and the blackish hue of the dike itself."[3]

[2] Opinion in Appendix, page A-16 , Finding of Fact 5.

[3] Opinion in Appendix, page A-26 , Conclusion of Law 15.

Based upon the decedent's familiarity with the area near the dike the District Court also held the decedent to have negligently contributed to his fatal injuries. Fault was apportioned such that the decedent was responsible for 75% and the United States to the extent of 25%.[4]

In assessing negligence against the United States the District Court relied upon *Indian Towing Company v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955), as well as 14 U.S.C. §§2, 81, and 86, and *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975).

The District Court, citing *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951) as to a government sponsored nautical "trap", essentially summed up its holding as follows:

> "The Corros estate's claim against the United States is founded upon what this court feels is an extremely dangerous dike obstruction, which obstruction spans about one-fourth the width of the Cooper River, is on some occasions almost totally submerged, is very dark, blackish-brown in color, has no markings of any kind, and upon the seaward end of which rests a single white, 4-second flashing light, that, when lit, only burns four-tenths of a second, with the power of 7 watts." (Conclusion of Law 14.)

The Circuit Court of Appeals reversed the judgment of the District Court as to the negligence of the United States. It did so by distinguishing *Lane*[5] for two reasons. First, while conceding the dike was "technically an obstruction" in the navigable waters (Opinion in Appendix, page A-8) the Court held that 14 U.S.C. §86 was not applicable to a structure such as a dike since it was constructed for a proper governmental purpose.

Secondly, the Court of Appeals reasoned that *Lane* and presumably 14 U.S.C. §86, still provided no basis for

[4] Opinion in Appendix, page A-35

[5] *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975).

imposing any liability upon the United States. In this regard the Court said,

> Even is we assume that §86 applies to the present case. *Lane* still provides no basis for imposing liability upon the government. *Lane* held that the government can be held liable in admiralty whenever a private person would be. But to find liability there must first be found a duty violated. In *Lane* the court emphasized that Congress in 33 U.S.C. §409 had imposed upon private owners a duty to mark their sunken vessels, and that justified imposing such a duty, although discretionary, upon the government.[6] Plaintiff here has presented us with no authority and has introduced no evidence that would impose upon anyone a duty to mark the dike any more clearly than the United Stated did in this case. We decline to impose this even higher duty on the government. Thus, *Lane* is inapposite for it requires that a duty be found in the first instance. (Opinion in Appendix, page A- 9).

Lastly, the Court of Appeals declined to impose any liability upon the United States under *Indian Towing*[6] holding that "... at no time did the government exercise its discretion to lead the public or the plaintiff to believe that there was safe passage between the light and the land." (Opinion in Appendix, page A-10).

[6] *Indian Towing Company v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed 48 (1955).

REASONS FOR GRANTING THE WRIT

I.

THE FOURTH CIRCUIT COURT OF APPEALS HAS RENDERED A DECISION WHICH UNDULY LIMITS THE PROVISIONS OF 14 U.S.C. §86 AS IT APPLIES TO ALL NON-VESSEL PROPERTY OWNED BY THE UNITED STATES WHICH MIGHT BE CONSIDERED AN "OBSTRUCTION" IN THE NAVIGABLE WATERS OF THE UNITED STATES.

THE LANGUAGE OF THE CIRCUIT COURT DECISION ITSELF SUGGESTS THAT ITS HOLDING IS CONTRARY TO "THE LITERAL WORDS OF"[7] 14 U.S.C. §86. SUCH AN IMPORTANT QUESTION OF FEDERAL LAW HAS NOT BEEN DECIDED BY THE SUPREME COURT AND SHOULD BE.

14 U.S.C. §86 is sometimes referred to as a "marking" statute. It provides that the Coast Guard[8] "may" mark certain objects located in the navigable waters of the United States "for the protection of navigation". The scope of its applicability, in terms of a duty imposed, seems clear by the language of the statute itself, but confused and unduly restricted by the decision of the Court of Appeals below. Prior to 1965, §86 referred only to "any sunken vessel or other similiar obstruction" 63 Stat. 501, 14 U.S.C. §86 (1949). In 1965 the word "similiar" was removed so that the statute then referred to "any sunken vessel or other obstruction". 79 Stat. 822, 14 U.S.C. §86 (1965).

[7] Opinion in Appendix, page A- 8

[8] The statute uses the word "Secretary" which means the Secretary of the respective department in which the Coast Guard is operating. 14 U.S.C. § 5.

Across the country there are vast numbers of "objects" in the navigable waters owned by the United States which are not vessel related. Does every such non-vessel "object" constitute an "obstruction" within the meaning of 14 U.S.C. §86? Or, as the Fourth Circuit would have it, will each District Court and Circuit Court be allowed to exercise separate judgments concerning whether or not to apply 14 U.S.C. §86 as to which non-vessel "objects" constitute "obstructions"?

14 U.S.C. §86 clearly does not mandate markings for every non-vessel "object". It provides that the Coast Guard "may" mark in such manner and for so long as, in [its] judgment, the needs of maritime navigation require." (Explanation in brackets supplied).

With respect to non-vessel property what duty arises, if any, upon the Coast Guard whenever its Secretary, in the first instance, exercises his discretion under §86 to mark? The importance of the question is illustrated by the following cases from different circuits. *Doyle v. United States*, 441 F. Supp. 701 (D.C. S.C. 1977) (United States held liable for inadequate markings at ferry crossing area). *Bearce v. United States*, 614 F.2d 556 (7th Cir. 1980) Cert. denied, _____ U.S. _____ , 101 S. Ct. 112 (1980). (Petition for Rehearing of Denial of Writ of Certiorari pending.) (United States held not liable for markings at breakwater system.) *Chute v. United States*, 449 F. Supp. 172 (D. Mass.), 610 F.2d 7 (1st Cir. 1979), Cert. denied, _____ U.S._____, 100 S. Ct. 2155 (1980). (United States held not liable for buoy markings near remains of a target ship.)

Dikes, breakwater walls, remains of target ships, dolphins, piers, wharfs, sea walls, et cetera, constructed by the United States pose numerous opportunities for maritime accidents and litigation. It seems to the litigant that the impact of the decision of the Circuit Court below is to provide national precedence for the proposition that 14 U.S.C. §86, despite its 1965 amendment, will not apply to any maritime disaster

unless the property owned by the United States was a "sunken vessel", something clearly not intended by Congress. Such far reaching result should not be left to the interpretation rendered by a single Circuit Court.

II.

THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE "GOOD SAMARITAN" PRINCIPLE OF *INDIAN TOWING COMPANY V. UNITED STATES*[9].

Indian Towing allows the United States not to exercise its discretion concerning an undertaking — in that case, a lighthouse service. However, if the undertaking is assumed and reliance is engendered because of the undertaking then the United States must exercise due care to make certain the task undertaken is performed in a careful manner. The Circuit Court below concluded, contrary to the findings of facts determined by the District Court, as follows:

> ". . . the Coast Guard undertook only to light the channel end of the dike with a light, and at no time did it fail to perform that undertaking. The record is entirely void of any evidence showing that the light somehow would induce a boater to believe that there was nothing between it and land. The chart published by the government, for example, is to the contrary. Also important is the fact that the Coast Guard never undertook to provide additional lighting or markings on the dike; it therefore could never have engendered reliance on additional markings. The only untertaking of the Coast Guard was maintaining the light on the end of the dike, and the record indicates that this undertaking was performed properly.
>
> The *Indian Towing* doctrine is therefore inapplicable to the present case, for at no time did the government exercise its discretion to lead the public or the plaintiff

[9] 350 U.S. 61, 76 S.Ct. 722, 100 L.Ed. 48 (1955).

to believe that there was safe passage between the light and the land." (Opinion in Appendix, page A-10)

The standard of review in admiralty cases is that the judgment of the District Court may not be set aside unless it is "clearly erroneous". *McAllister v. United States*, 348 U.S. 19, at 20, 75 S. Ct. 6, at 7, 99 L. Ed. 20 (1954).

The District Court Found that:

> "With the tide likely at the time of the collision, the top of both the cell and the wall were then about two feet above the water's surface, and was not visible to an approaching boatman." (Finding of Fact 5.)
>
> "The evening was clear and it was almost completely dark when the collision occurred — there was no moon — the water was calm — the wind was moderate — the tide was flooding and was about one hour from high tide. (Finding of Fact 3.)

Commenting upon "a very close duplication of the accident" the District Court arrived at some of its findings of facts from testimony about four boating experiments conducted by the Corros estate. After finding that the decedent was "looking ahead"[10] and keeping a proper lookout"[11] the District Court addressed the United States contention that the speed of the boat somehow caused the bow of the boat to rise up and block, or partially impair, the decedent's view of the dike, terminal cell and its single light. The District Court said,

> "Mr. Thomas [the boat experimenter] testified that once the boat reached cruising speed, it leveled off and ran flat so that the bow did not obstruct his vision. This court is convinced that an unobstructed lookout was maintained by Mr. Corros." (Finding of Fact 15.) (Explanation supplied).

[10] Finding of Fact 15.

[11] Conclusion of Law 17(d).

Indian Towing says there must be an "undertaking", which occurred in the instant case when a light was placed upon the terminal cell. There must also be a "reliance" engendered by the guidance afforded by the light. The violence to the principles of *Indian Towing* occurred when the Circuit Court tried to *factually* limit the purpose of the United States' "undertaking" with respect to the (1) selection of the method of marking and (2) the placement of the light. Without giving consideration to the other special circumstances attendent unto this particular dike the Circuit Court *factually* concluded that a single light was a sufficient method of marking.

The obvious practical effect of the light, as a method of marking, and its placement was to warn mariners of the physical location of the terminal cell and the dike itself, not just the terminal cell. In short, "How could the terminal cell and dike be marked, with reasonable due care applied, so as to enable an approaching boatsman to *see* either the dike, the terminal cell or *the marking itself?*" In what seems to be a comment upon this practical question the District Court made a finding that,

> "Due to the angle of the dike from the shore of Daniel Island — (56° South of West) — it is possible for a mariner riding close to the Island, and out of the channel, to lose sight of the dike light on his port side, as he moves past the light, before reaching the dike itself." (Finding of Fact 18.)

Indeed, the discretion utilized by the Coast Guard is marking the Corros dike is well illustrated by the comparative discretion utilized by the Coast Guard concerning the dike, or breakwater system, in the Chicago harbor. *Bearce v. United States,* supra. The actual dike struck by the Bearce boat had no light or marking at all. The opposite channel dike, however, had a single flashing light atop but, instead of a white light as with the Corros - struck dike, the Bearce light was green. Moreover, its placement was at a point 97 feet from its end, instead of being atop the channelward end as was

the Corros light.

If a marking, or in this case a light, is utilized by the Coast Guard to mark a non-vessel structure in the navigable waters then mariners should be able to rely upon the markings — or light - to the extent that if they have general familiarity with the area where the structure is located, and they keep a proper lookout, they will be able to see either the structure, as marked, or the marking or lighting itself. This Mr. Corros could not do under the special circumstances attendant unto this particular dike at the time of the collision, despite his familiarity with the area and the maintenance of a proper lookout. The District Court concluded:

> ". . . the Daniel Island contraction dike must be in a class by itself. Considering evidence resulting from boating experiments conducted by three different witnesses, one presented by each party . . . , there was no testimony which suggested, under the circumstances facing Mr. Corros on the ill-fated night in question, that the outline of the dike itself could be seen — even against the background of the lights on the [nearby] dock." Conclusion of Law 15. (Explanation supplied).

The findings of fact by the District Court in support of its judgment of propositional fault were simply ignored by the Circuit Court which substituted its judgement without any holding that the judgment of the District Court was "clearly erroneous" as required by *McAllister*.

In *Indian Towing* the light which afforded guidance was "not operable" because it had burned out. In Corros the light which afforded warning, not guidance, was "not operable" because the special circumstance attendent — angle of dike, its blackish hue, its 1,100 feet length, its height above water level of about 2 feet, the competing lighting systems on a nearby dock — created a situation, or nautical "trap", which rendered the light difficult, if not impossible, to see by an approaching boatsman

familiar with the area who was maintaining a proper lookout.[12]

CONCLUSION

For these reasons your petitioner prays that a Writ of Certiorari do issue to the Fourth Circuit Court of Appeals so that the record therein and issues might be more fully reviewed.

Respectfully Submitted,

Wheeler M. Tillman
Counsel for Petitioner

January 20, 1981

[12] Interestingly, another fatality occurred in a collision between this same dike and another pleasure boat, also traveling from sea, on December 7, 1979. *Shafer v. United States*, (D.C.S.C. Civil Action #80-1648-8. Not yet tried.) (Complaint alleges inadequate marking and that light was not lit.)

APPENDIX

In the

United Court of Appeals

For the Fourth Circuit

Michael D. MANGNO,

Plaintiff,

v.

Helen Louise Bowling CORROS,
Administratrix of the Estate
of Richardo Abello Corros,

Appellee,

v.

The UNITED STATES of America,

Appellant,

Exxon Corporation, Third-Party

Defendant.

No. 78-1175.

Argued Dec. 3, 1979.

Decided Sept. 10, 1980.

Before BRYAN, Senior Circuit Judge, and WIDENER and MURNAGHAN, Circuit Judges.

WIDENER, Circuit Judge:

Plaintiff's[1] decedent, Richardo Corros, died of injuries received when the motorboat he was operating collided with a sheet steel dike built and maintained by the United States. Plaintiff sued the United States, alleging that the government's failure properly to light the dike was the cause of the accident. After trial, the district court, 439 F.Supp. 592 (D.S.C.) held the decedent 75 percent at fault for the collision and the United States 25 percent at fault. The government appeals from that judgment on the ground that it was under no duty to provide additional lighting on the dike. We agree with the government's contention and therefore reverse.

On the morning of September 29, 1973, the decedent and two passengers went fishing in the decedent's boat, a fifteen-foot open outboard. The men launched the boat on the Cooper River at Charleston, South Carolina, and later in the day proceeded to the Wando River for fishing. The Wando and the Cooper come together south of Daniel Island.

At the completion of the day they headed toward the Cooper River, with Mr. Corros at the controls of the boat. He rounded the southern tip of Daniel Island to starboard to run northbound on the Cooper, and ran outside the marked channel taking bouys N44 and R46 to port and Daniel Island to starboard. The speed of the boat was between 29 and 39 miles per hour.

In the glove compartment of the boat was a chart of that area of the river clearly showing the dike with the light at its channel end, but Corros apparently did not

[1] A passenger in the decedent's boat initially brought suit against Mrs. Corros, administratrix of the estate, for injuries received in the accident. Mrs. Corros sought indemnity against the United States for any amount of her liability and damages for the death of her husband. The passenger ultimately settled his claim with the Corros estate, so the only issue on appeal is that of the government's liability to Mrs. Corros

use it on this occasion. Additionally, he did not use the boat's searchlight.

At about 8:00 p.m., in clear weather and when it was almost completely dark, the boat hit the Daniel Island Contraction Dike at a point about 280 feet shoreward from its channel end. All three men were thrown into the water and were injured. Corros died of his injuries some five days after the accident.

The Daniel Island Contraction Dike, built pursuant to Congressional authorization,[2] was completed in February 1959. Its purpose was to increase the water velocity in the Cooper River channel and reduce shoaling inthe channel caused by upstream activities of the State of South Carolina. The dike is a sheet steel pile structure extending 1,100 feet to the southwest from Daniel Island. The shore end is anchored in a 100 foot long rubble mound. The channel end is anchored by a terminal cell, a sheet steel pile cylinder twenty-three feet in diameter, filled with crushed rock. At the time of the collision, the top of the dike was approximately two feet above the surface of the water, and the district court found it was not visible to an approaching boater.

At the channel end of the dike is Cooper River Dike Light 46-A, a fifteen foot high fixed tower structure supporting an all-around white light that flashes every four seconds. It is the only light to mark the dike and is designed to mark both the channel's eastern boundary and the end of the dike. Light 46-A complies with the lateral bouyage system of the United States, and correctly marks the channel and the channel user's way around the dike. The light was functioning properly at all pertinent times.

Corros, having fished in the area for several years prior to the collision, was aware of the existence and location of the dike and Light 46-A. After purchasing his

[2] River and Harbor Act of September 3, 1954,68 Stat. 1248, amending the River and Harbor Act of October 17, 1940, 54 Stat. 1198.

own boat in February 1973, he fished in the area often, usually returning after dark and always going around the dike and Light 46-A.

At the time of the collision, Corros had neither of his passengers keep a lookout, although he was looking ahead from his position at the wheel. Apparently no one in the boat saw the dike until the boat was close to the point of impact. The boat hit the dike approximately head-on.

Based on these facts, the district court held that having constructed the dike, the United States undertook to mark it, and under *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), and *Lane v. United States*, 529 F.2d. 175 (4th Cir. 1975), it was required to do so in a manner so as not to abuse its discretion. The court concluded that due to the appearance and visibility of the dike in question, the United States was grossly negligent in marking it with a solitary light on the channel end, and therefore clearly abused its discretion. The court concluded that the government was 25 percent at fault for the collision and Corros 75 percent at fault. This appeal followed.

It is a familiar rule of tort law that there is no liability for negligence in the absence of a duty and breach of that duty. W. Prosser, Law of Torts § 30, at 143 (4th ed. 1971. Thus, a decisive issue in this case is whether the United States was under a duty to provide additional lighting or some other type of marking on the dike as a warning to boaters in the area. Two theories are argued in support of finding that duty, both of which, however, fall short in this case.

First, plaintiff contends that 14 U.S.C. § 86 applies and under *Lane v. United States*, 529 F.2d. 175 (4th Cir. 1975), the Coast Guard abused its discretion in failing to provide additional lighting on the dike. Section 86 states in relevant part:

> The Secretary may mark for the protection of navigation any sunken vessel or other obstruction

> existing on the navigable waters . . . of the United States is such manner and for so long as, in his judgment, the needs of maritime navigation require . . . This section shall not be construed so as to relieve the owner of such obstruction from the duty and responsibility suitably to mark the same and remove it as required by law . . .

Plaintiff argues, and the district court held, that when the government undertook to mark the dike, it was so grossly negligent in the marking of it that it abused its discretion under *Lane* and was therefore subject to liability for the collision.

In *Lane* a ski boat collided with an unmarked barge that had wrecked and sunk some five years earlier. The original owner of the vessel had failed to remove it after it sunk, and under 33 U.S.C. § 409[3] it was therefore treated as abandoned and thus subject to the ownership of the United States. Each of the five years after the sinking of the barge approximately eight to ten boats had run upon it. This court held that, although under § 86 the government is under no mandatory duty to mark submerged wrecks, it must exercise its discretion responsibility and cannot "ignore submerged wrecks of which [it] is informed, or fail to mark them if they constitute real dangers to navigation." Id. at 179. The court concluded that under the Suits in Admiralty Act, 46 U.S.C. §§ 741 et seq., the United States is to be held accountable whenever a private person, in similar

[3] 33 U.S.C. § 409 states in pertinent part:

[W]henever a vessel . . . is wrecked and sunk in a navigable channel . . . it shall be the duty of the owner . . . to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner . . . to commence the immediate removal . . . and failure to do so shall be considered as an abandonment . . .

circumstances, would be,[4] and the clear responsibility of private owners to mark sunken vessels requires the Coast Guard to exercise "care and prudence to mark submerged wrecks which constitute substantial hazards to navigation." Id.

Lane is distinguishable for two reasons. First, we do not think 14 U.S.C. § 86 applies to the present case. Even though the literal words of the statute may not limit that section to obstructions such as sunken wrecks,[5] we do not feel that it applies to the dike in the present case. The dike, although technically an obstruction in navigable waters, is in fact an aid to navigation for it was constructed in order to increase the water velocity in the Cooper River and therefore assist navigation. Of additional import is the fact that Congress authorized that the dike be constructed in the first instance. Cf. *Chute v. United States*, 610 F.2d 7, 10-11 (1st Cir. 1979), cert. denied, _____ U.S. _____, 100 S.CT. 2155, 64 L.Ed.2d 789 (1980) (holding 33 U.S.C. § 409 inapplicable to a ship deliberately sunk for use as a bombing target). We feel that § 86 is inapplicable to a structure such as the dike in this case which was constructed for a proper governmental purpose.

Even if we assume that § 86 applies to the present case, *Lane* still provides no basis for imposing liability upon the government. *Lane* held that the government can be held liable in admiralty whenever a private person would be.

[4] 46 U.S.C. § 742 states in pertinent part:

> In cases where . . . if a private person or property were involved, a proceeding in admiralty could be maintained, any appropiate nonjury proceeding in personam may be brought against the United States . . .

[5] Prior to 1965, 14 U.S.C. § 86 referred only to marking "any sunken vessel or other similar obstruction . . ." 14 U.S.C. § 86(1956). In 1965 the word "similiar" was deleted from the section. See *Doyle v. United States*, 441 F. Supp. 701, 709 (D.S.C. 1977). See also Senate Report n. 688, U.S. Code Congressional and Administrative News 1965 Vol. 2, 89th Congress, 1st Session, p. 3140,

But to find liability there must first be found a duty being violated. In *Lane* the court emphasized that Congress in 33 U.S.C. § 409 had imposed upon private owners a duty to mark their sunken vessels, and that justified such a duty, although discretionary, upon the government[6]. Plaintiff here has presented us with no authority and has introduced no evidence that would impose upon anyone a duty to mark the dike any more clearly than the United States did in this case. We declined to impose this even higher duty on the government. Thus, *Lane* is inapposite for it requires that a duty be found in the first instance.

Plaintiff also argues that the government in undertaking to light the dike did so in a negligent manner and under *Indian towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed 48 (1955), it therefore is liable for the death of Corros. An examination of *Indian Towing* demonstrates that the argument is not well taken.

Indian Towing involved a suit under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), for damages allegedly caused by the negligence of the Coast Guard in the operation of a lighthouse light. The Coast Guard, which operated the lighthouse, had neglected to repair it when it quit functioning properly. Plaintiff brought suit against the United States after its tug ran aground in the area of the lighthouse. The Supreme Court, in acknowledging the "good Samaritan" rule of tort law, id. at 64-65, 76 S.Ct. at 124 held:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance

[6] Compare *Chute v. United States*, 610 F.2d 7 (1st Cir. 1979), in which the First Circuit refused to apply §409 where the boater collided with the remains of a vessel that the Navy had intentionally scuttled for use as a bombing target. The court held § 409 inapplicable to an obstruction originally placed for a proper governmental purpose.

> on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

Id. at 69, 76 S.Ct. at 126.[7]

In the present case, the Coast Guard undertook only to light the channel end of the dike with a light, and at no time did it fail to perform that undertaking. The record is entirely void of any evidence showing that the light somehow would induce a boater to believe that there was nothing between it and land. The chart published by the government, for example, is to the contrary. Also important is the fact that the Coast Guard never undertook to provide additional lighting or markings on the dike, it therefore could never have engendered reliance on additional markings. The only undertaking of the Coast Guard was maintaining the light on the end of the dike, and the record indicates that this undertaking was performed properly.

The *Indian Towing* doctrine is therefore inapplicable to the present case, for at no time did the government exercise its discretion to lead the public or the plaintiff to believe that there was safe passage between the light

[7] See also *Somerset Seafood Co. v. United States*, 193 F.2d 631, 635 (4th Cir. 1951), in which the United States, in marking a wreck had placed the buoy some 500 feet from its proper location. This court held:

> [E]ven if the decision to mark or remove the wreck be regarded as discretionary, there is liability for negligence in marking after the discretion has been exercised and the decision to mark has been made. There is certainly no discretion to mark a wreck in such a way as to constitute a trap for the ignorant or unwary rather than a warning of danger.

In the present case, there has been no showing that the single light on the dike in question is a trap for the unwary.

and the land.

Although the limited resources of the Coast Guard may not be a decisive factor in the determination of this case, we should not be oblivious to those budgetary considerations in ascertaining whether or not there has been an abuse of discretion. Given the tremendous expense which would undoubtedly be involved in lighting all the authorized obstructions under the control of the Coast Guard,[8] in the absence of a Congressionally imposed requirement of additional marking, we feel that it is usually inappropriate for a federal court to impose such a requirement and in effect direct the Coast Guard how to spend its limited resources. Every dollar of its money that we direct it spend is diverted from another regulatory activity. Cf. *Gercey v. United States*, 540 F.2d 536, 538-39 (lst Cir.1976), cert. denied, 430 U.S. 954, 97 S.Ct. l599, 5l L. Ed.2d 804 (1977).

Accordingly, the judgment od the district court is REVERSED.[9]

[8] While the record is silent as to the number of unlighted obstructions to navigation present in the navigable waters of the United States, it does indicate that there are some 631 unlighted buoys and over 3200 unlighted beacons located in the Seventh Coast Guard District alone.

[9] Most of the essential facts in this case are indistinguishable from those of *Bearce v. United States*, 614 F.2d 556 (7th Cir. 1980). The light in Bearce was at the end of a breakwater and tahe Seventh Circuit held that the discretionary function exception to the Tort Claims Act should be implied in cases under the Suits in Admiralty Act. The First Circuit agrees with the Seventh. *Chute v. United States*, 610 F.2d 7 (1st Cir. 1979); *Gercy v. United States*, 540 F.2d 536 (1st Cir. 1976). The Fifth Circuit, in *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140 (5th Cir. 1971), agrees with *Lane* of this circuit.

United States District Court
District of South Carolina
Charleston Division

Civil Action No. 75-732

MICHAEL D. MAGNO,

Plaintiff

v.

HELEN LOUISE BOWLING CORROS,
Administratrix of the Estate
of Ricardo Abello Corros,

Defendant and Third-Party Plaintiff,

v.

UNITED STATES OF AMERICA and
EXXON CORPORATION,

Third-Party Defendants

Plaintiff, injured when the motorboat in which he was riding as a passenger collided with a dike constructed by the United States, here sues the estate of the boat owner, who was killed as a result of the same collision. The estate, as third-party plaintiff, impleaded both the United States and Exxon Corporation, seeking indemnity against the United States for any amount it must pay plaintiff, and, further, seeking damages against both third-party defendants resulting from the injuries to, and death of, the boat owner and for the loss of the boat and motor. Plaintiff amended his complaint to seek damages against both third-party defendants and later settled his claim against the Corros estate. The court granted an involuntary dismissal with prejudice to Exxon at the completion of the plaintiff's case, and the two-year limitation in the Suits in Admiralty Act, 46 U.S.C. §745, served to bar plaintiff's claim against the United States. All actions were brought pursuant to the Suits in Admiralty Act, 46 U.S.C. §742, *et seq*. A trial was held on February 8 -February 10, 1977, involving all liability issues except the counterclaim by the United States against the Corros estate under the Medical Care Recovery Act (42 U.S.C. §2651), for medical expenses incurred in treating Mr. Corros and his passengers. After receiving briefs from and hearing argument by counsel for the estate, the United States, and the Exxon Corporation, on September 27, 1977, the court makes the following findings of fact and reaches the following conclusions of law:

FINDINGS OF FACT

A. The Casualty

1. On the morning of September 29, 1973, Ricardo Abello Corros, Reynaldo A. Pellos and Michael D. Magno launched Mr. Corros' boat from the United States Naval Weapons Station on the Cooper River at Charleston, South Carolina, to go fishing. All three men were on active duty with the United States Navy, and all

were on liberty.

2. Mr. Corros' boat was a 15-foot, open, fiberglass-hulled, outboard, with steering wheel and engine controls located about one-third of the way behind her bow. There was a passenger compartment forward of this steering location and its windshield, as well as one aft. The boat was powered with an 85 horsepower motor, the maximum which she was designed to carry — half speed was 29 m.p.h., full speed was 39 m.p.h.

3. The group proceeded down the Cooper River to fish at places not relevant here, and ended the day fishing in the Wando River. They returned from the Wando River toward the Cooper River and the Naval Weapons Station with Mr. Corros at the controls at all times. To make this homeward trip, they rounded the southern tip of Daniel Island, running from half to full speed outside the channel between Daniel Island on their starboard hand and buoys N-44 and R-46 on their port hand. There was a chart in the glove compartment of the boat, but no searchlight was being used. The evening was clear and it was almost completely dark when the collision occurred — there was no moon — the water was calm — the wind was moderate — the tide was flooding and was about one hour from high tide.

4. At approximately 8:00 o'clock p.m. on September 29, 1973, the boat ran into a sheet steel pile structure, known as the Daniel Island contraction dike, at a point on its length about 280 feet from its channelward end. All three men were thrown into the water, and all were injured. Mr. Corros died of his injuries some five days later; he was 34 years old, and left a widow and three children.

B. The Dike

5. The Daniel Island contraction dike — (the dike) — was built pursuant to the River and Harbor Act of September 3, 1954, 68 Stat. 1248, which amended the River and Harbor Act of October, 1940, 54 Stat. 1198. Its purpose was to increase the water velocity in the

Cooper River channel near it and to reduce shoaling in that channel caused by silting resulting from certain upstream activities conducted by the State of South Carolina. The dike was completed in February, 1959; from the Daniel Island shoreline, it runs 1,100 feet to the southwest. The first 100 feet is a rubble mound anchoring the shoreward end of a 1000-foot sheet steel pile wall. The channelward end is anchored by a terminal cell, a sheet steel pile cylinder 23 feet in diameter, filled with crushed rock. The top of the terminal cell and the top of the pile wall are elevated about nine feet above mean low water. With the tide likely at the time of the collision, the top of both the cell and the wall were then about two feet above the water's surface, and not visible to an approaching boatman.

C. The Light

6. Cooper River Dike Light 46-A, a fixed tower structure supporting an all-around white light, flashing every four seconds, with the light having a rated visibility of four miles, was built on the channelward portion of the terminal cell in April, 1959.

7. The purpose of Light 46-A is to mark the channel's eastern boundary and to mark the end of the dike. No other lights mark the dike.

8. The Light was functioning at all times pertinent to this tragedy.

D. The Exxon Pier

9. Across the Cooper River from the dike and the light, there is a petroleum pier and mooring dolphin complex owned by Exxon, or its predecessors, since its construction in 1934. This pier extends about 350 feet into the Cooper River from the low water shoreline to the west face of the wharf. The total north-south length of this facility is 950 feet; it roughly parallels the channel in the Daniel Island Reach portion of the Cooper River.

10. The Exxon pier is lighted all night by a total of 81

lights on the piers proper, plus lights in two offices. All of these are 60 watt 360° white lights, except 7-60 watt red 360° lights at petroleum handling stations, 2-150 watt white 180° lights facing south, 2-150 watt reflector white lights directed down, 2-250 watt mercury vapor 360° lights, and, on a tower on the west face of the pier, 1-150 watt white 180° flood light facing southeast, 2-250 watt 360° mercury vapor lights on the east side, 1-300 watt white 180° flood light facing east, 2-150 watt mercury vapor 360° lights on the east side, 2-100 watt 360° white lights, and 3-500 watt 360° mercury vapor lights.

11. There are no other lights on this facility specifically designed to warn boats or ships, nor would the Coast Guard, if asked, require any such warning lights in view of the existing lights on this dock. The dock was constructed pursuant to the terms of a permit issued by the Department of the Army, Corps of Engineers, on January 31, 1955, and the facility was completed by the end of the year 1956. Exxon was required by the provisions of §66.01-35 of Title 33, of the Code of Federal Regulations —(Navigation and Navigable Waters) — to display, at its own expense, such lights for the protection of navigation as might be prescribed by the Commandant of the Naval District. There was no evidence that Exxon had made such lighting application, although Commander William J. Brogdon, Jr., USCG, Chief of the Aids to Navigation Branch of the Seventh Coast Guard District, testified that since approximately twenty (20) years had passed from the time the pier was constructed, the absence of such a permit in the file was not unusual. He further testified that if such an application had been made in 1956, and if the lights in 1956 were essentially the same as they are now, he would be the person responsible for acting upon the application, and he would have approved the Exxon lighting scheme, since the structure itself is very well lighted, and the object of lighting an obstruction is to prevent the boating public

from colliding with it. Exxon did present proof that its lighting is substantially the same now as it was in 1956, and that its facility was inspected by the United States Coast Guard twice a year in accordance with 33 C.F.R. §126.01. *et seq.*, in order to qualify as a "designated waterfront facility" to handle dangerous cargo. One of the prerequisites to such a designation is adequate lighting, 33 C.F.R. §126.15(1)(n). The "Waterfront Facility Inspection Reports" dated March 15, 1973, and November 23, 1973, respectively, indicated that the "illumination" of the Exxon dock was in conformance with Coast Guard regulations regarding that type of inspection. 33 C.F.R. §126.01, *et seq.*

E. Liability

12. U.S. Coast & Geodetic Survey Chart No. 470 and the Inland Rules of the Road apply to the scene of this casualty. Chart 470 is the most detailed chart of the area. All the foregoing features pertinent to this casualty are shown on Chart 470, among such being the Cooper and Wando Rivers, Daniel and Drum Islands, buoys N-44 and R-46, light 46-A, the dike, and the Exxon pier.

13. While Chart 470, or some other harbor chart, was available to Mr. Corros in his boat's glove compartment, on his return trip on September 29, 1973, to the Naval Weapons Station from the Wando River, there is no evidence that he used such chart or charts on that occasion.

14. Mr. Corros was well aware of the existence and location of the dike and of light 46-A. He had fished in that area for four or five years preceding the casualty, anchoring on occasion in the immediate vicinity of the dike to fish. After buying his boat in February, 1973, he fished often, navigating the Cooper River from the Naval Weapons Station, among other areas, usually returning after dark. On each of these occasions, he went around the light and the end of the dike, or this casualty would have occurred earlier; indeed, his

fishing companion of several years, Mr. Johnson, testified that he and Mr. Corros often returned home after dark along the same route, namely, between buoys N-44 and R-46 on their port hand and Daniel Island on their starboard hand, but always going around light 46-A and the dike.

15. Mr. Corros did not have either of his passengers keep a lookout; however, Mr. Corros, from his position at the wheel, was looking ahead. Apparently, no one on the boat saw the dike until the boat was close to the point of impact. The boat hit the dike nearly head-on. Government counsel suggests that the speed of the boat caused the boat to plane, thus lifting its bow out of the water to obstruct or impair Mr. Corros' vision. The damage to the front of the boat — no damage underneath the curvature of the bow — suggests that the boat was flat in the water when the collision occurred, not planing. In addition, on November 21, 1976, Gary N. Thomas, a witness for the Corros estate, in a very close duplication of the accident, made four runs at the 280 foot impact point on the dike at a medium or moderate speed, in a 15 foot Caravelle fiberglass boat identical to the one owned by Corros, with an 85 horsepower outboard Evinrude motor. Mr. Thomas testified that once the boat reached cruising speed, it leveled off and ran flat so that the bow did not obstruct his vision. This court is convinced that an unobstructed lookout was maintained by Mr. Corros.

16. Light 46-A at all pertinent times complied with the lateral buoyage system of the United States, as to its color and characteristics. It correctly marked the channel and correctly marked the channel user's way around the dike, being designed to direct northbound traffic to leave the dike to starboard.

17. The lights on the Exxon pier are not in line with light 46-A for vessels using the channel of the Cooper River. For small craft operators proceeding like Mr. Corros, light 46-A is horizontally within the arc of the

Exxon lights as such craft round the southern end of Daniel Island, however, on an approach from that vicinity, light 46-A is readily distinguishable from the Exxon lights behind it, both because as the dike is approached, the dike light shows about twice as high above the water as the Exxon lights, and because the dike light is a flashing light. The vertical displacement of the dike light over the Exxon lights increases greatly as a boat approaches; accordingly, at no time when the dike presents a hazard to an approaching boater would an observant boater lose the dike light in the background of the Exxon lights.

18. Due to the angle of the dike from the shore of Daniel Island — (56° South of West) — it is possible for a mariner riding close to the Island, and out of the channel, to lose sight of the dike light on his port side, as he moves past the light, before reaching the dike itself.

CONCLUSIONS OF LAW

A. Jurisdiction

1. This court has jurisdiction of the parties and subject matter of this litigation. [28 U.S.C. §1333, 28 U.S.C. §1346(b)]. Venue is correctly laid.[28 U.S.C. §1391, 46 U.S.C. §742].

B. Nature of Claims

2. The Corros estate, in addition to seeking indemnity for anything which it has paid the plaintiff, asserts affirmative claims against the United States and Exxon Corporation for the personal injuries to, and wrongful death of, the decedent, together with a claim for property damage to the boat. The United States, on the other hand, counterclaims against the Corros estate under 42 U.S.C. §2651 for medical expenses it incurred for treatment rendered to Mr. Corros and his two passengers.

C. Negligence and Liability of Exxon

3. In this litigation, the Corros estate seeks recovery

against Exxon Corporation, either jointly with the United States, or severally. The basis of the estate's claim against Exxon rests upon an aleged violation of 33 U.S.C. §403, which reads in part as follows:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited . . "

4. Specifically, in support of its claim against Exxon, the Corros estate charges that Exxon failed to comply with the requisite permit requirements in 1955 when the lights on the Exxon dock were installed.

5. This court finds that Exxon did not comply with the statutory requirement, 33 C.F.R. §66.01-35, that it have the Coast Guard approve proper lighting for its dock. Although the dock was inspected twice a year as a waterfront facility for loading dangerous cargo, and the Coast Guard made no general objection to the lighting scheme, the Waterfront Facility Inspection Reports do not satisfy the requirement that Exxon — (the permitee) — "shall apply" to the District Commandant of the Coast Guard for lighting approval. 33 C.F.R. §66.01-35.

6. The Code of Federal Regulations has the same force and effect, as do Acts of Congress (*Rodway v. U.S. Dept. of Agriculture*, 514 F.2d 809 (D.C. Cir. 1975); accordingly, any violation of the Code of Federal Regulations can be said to be a "statutory" violation, as opposed to a violation of the general standards of due care. It is only "statutory" fault which invokes the so-called "Pennsylvania Rule" of admiralty law. In *The Pennsylvania*, 86 U.S. 125, 136 (1873), the Supreme Court stated this rule as follows:

". . . But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case, the burden rests upon the ship

of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

In view of the "statutory" violation of Exxon — *i.e.*, permit violation — this court is required to apply the "Pennsylvania Rule" to Exxon to determine its liability to the Corros estate.

7. The only way that Exxon's aforesaid "statutory" fault could have contributed in any manner to the accident in question would be if Exxon's dock lights presented background lighting which tended to obscure the dike light to one approaching as did the decedent here. However, the meshing of the dock lights with the dike light is a matter over which, as the record reveals, Exxon had no control. The positioning and illumination of the dock lights were within Exxon's authority, but Exxon had no authority whatsoever over either the construction of the dike light or the dike itself. Thus, Exxon cannot now be charged with the totality of the maritime conditions surrounding its dock.

8. This court has concluded that Exxon has overcome the burden imposed upon it under the "Pennsylvania Rule." With regard to the lighting factors just mentioned, Exxon has proved to the satisfaction of this court that its statutory violation of the duty to secure a permit could not possibly have contributed to the collision between the boat and the dike because, as heretofore found — (Finding of Fact #17) — the Exxon lights were of no moment to an approaching boat when the dike became a hazard.

9. Since this court has concluded that Exxon has proven its limited involvement in the lighting combination pattern could not possibly have contributed to the injury and death of Mr. Corros, this court finds, and it is so ordered, that Exxon Corporation has no liability to the Corros estate.

NEGLIGENCE AND LIABILITY OF THE UNITED STATES

10. The United States had clear authority to construct the dike in question. (33 U.S.C. §403). It also is given discretion to decide, once having constructed the dike, whether or not to mark it. (14 U.S.C. §86). The Corros estate's dispute with the United States, and one of the legal issues to be decided by this court, is whether the United States, having made the decision to place the Daniel Island contraction dike in the Cooper River, and having further decided to light the dike, abused its discretion under 14 U.S.C. §§2, 81, and 86 in marking the dike with only one light at its channel end.

11. The United States contends that the Corros estate cannot question the decision to place the dike in the Cooper River, nor the manner, fashion, style, or means of marking the dike, whether such marking be done by a light, or multiple lights, flags, condensing panels, additional floating buoys, reloaction of existing buoys, or other means. This is the "discretionary function" exception which, under the Federal Tort Claims Act, 28 U.S.C. §2680(a) — when such Act is applicable — relieves the United States from responsibility for acts done in the discretion of its agents. The United States, under this theory, urges this court to follow the First Circuit Court of Appeals which has held that the "discretionary function" exception, clearly stated in the Federal Tort Claims Act, applies as well to the Suits in Admiralty Act, under which this suit is brought, even though that exception is not stated therein. Such is the impact of *Gercey v. United States*, 540 F.2d 536 (1 Cir. 1976). That decision, however, runs contrary to the rule in this Circuit, because our Court of Appeals has precisely, and quite clearly, reached the opposite conslusion:

> "There is no basis upon which we can import the many exceptions in the Tort Claims Act into the Suits in Admirality Act, where the United States is held

accountable in admiralty whenever a private person, in similar circumstances, would be." *Lane v. United States*, 529 F.2d 175, 179 (4 Cir. 1975).

12. The United States also contends that it constructed and marked the dike according to its usual procedure and that it has no further responsibility. However, the Corros estate claims that the United States abused its discretion in failing to properly and sufficiently mark the dike to give warning to approaching boaters. The Coast Guard, despite its authority to establish aids to navigation and to mark obstructions — (14 U.S.C. §§2, 81, and 86) — has been held liable in many instances for improperly and negligently performing such duties. Citing the "good Samaritan" rule, the United States Supreme Court has determined the extent of theis responsibility, once a decision to establish and/or mark an aid to navigation has been made. In a Federal Tort Claims Act case involving the failure of a light-house light, that Court said:

> ". . . it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." *Indian Towing Company v. United States*, 350 U.S. 61, 65 (1955).

In discussing the duty of the United States in such circumstances, the Court in *Indian Towing* further said:

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light . . . and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning." *Id.*, at page 69.

The Fourth Circuit Court of Appeals adopted this "good Samaritan" rationale, and warned in clear

language against a government sponsored nautical "trap." In a case involving negligent marking of a wreck, that Court said:

> "... even is the decision to mark or remove the wreck be regarded as discretionary [a Tort Claims Act case], there is liability for negligence in marking after the discretion has been exercised and the decision to mark has been made. There is certainly no discretion to mark a wreck — (dike here) — in such way as to constitute a trap for the ignorant or unwary rather than a warning of danger." *Somerset Seafood Co. v. United States*, 193 F.2d 631 (1951), at 635. (Explanations added).

In *Afran Transport Company v. United States*, 309 F. Supp. 650 (S.D.N.Y. 1969), a case involving an off-station buoy, the district court, citing an early Supreme Court decision, held the Coast Guard to task regarding buoy placement, and "other warnings":

> "As stated in *Casement v. Brown*, 148 U.S. 615, 627, 13 S. Ct. 672, 677, 37 L. Ed. 582 (1893): '(I)t would be placing too severe a condemnation on the conduct of the pilots in charge of the boats to say that their error of judgement, their dependence on the appearance of the stream, and *their reliance upon the duty of the defendants to place suitable buoys or other warnings*, was such contributory negligence as would relieve the defendants from liability for the results of their almost confessed, and certainly undoubted, negligence'." *Id.* at 658 (Emphasis added by Afran Court).

13. The United States argues in the instant case that it gave notice of the dike and the dike light on the U.S. Coast and Geodetic Survey Chart and that this warning is sufficient to relieve it from all responsibility. However, as the case of *Lane v. United States*, 529 F.2d 175 (4 Cir. 1975) makes clear, the failure of an experienced navigator, familiar with the area, to consult a chart does not, in itself, absolve the United States of its liability.

14. The Corros estate's claim against the United States is founded upon what this court feels is an extremely dangerous dike obstruction, which obstruction spans about one-fourth the width of the Cooper River, is on some occasions almost totally submerged, is very dark, blackish-brown in color, has no markings of any kind, and upon the seaward end of which rests a single white, 4-second flashing light, that, when lit, only burns four-tenths of a second, with the power of 7 watts. The United States contends that it could not possibly, within the limits of its financial ability, place special lights and other such warnings upon all the various obstructions to navigation which exist in the waters of the United States because of the sheer number of such objects. This court, on the other hand, feels that very few of these objects existing today could be as dangerous as the dike in question. Judicial review of the danger involved is dependent upon the special circumstances and facts surrounding the particular obstruction in question, not upon obstructions to navigation in general.

15. This court has concluded that the Daniel Island contraction dike must be in a class by itself. Considering evidence resulting from boating experiments conducted by three different witnesses, one presented by each party except the plaintiff, there was no testimony which suggested, under the circumstances facing Mr. Corros on the ill-fated night in question, that the outline of the dike itself could be seen — even against the background of the lights on the Exxon dock. The testimony concerning the boating experiments all centered around the visibility or invisibility of the small, flashing dike light. Based on this evidence, this court is persuaded that very little of the dike rose above the water level at the time of the collision, and that whatever part rose above the water level was hardly visible under the combined factors of the darkness, the competing light systems, and the blackish hue of the dike itself.

16. Seeking to escape all responsibility for the collision, counsel for the United States urges that the decedent's own negligence was the sole proximate cause of his injuries and resultant death because the decedent violated a number of nautical statutes. While this court does hold that the decedent was guilty of casual contributory negligence, judged by general negligence standards, based upon his familiarity with the dike area, this court does not feel that the decedent's negligence was the sole proximate cause of the fatal collision, nor that the decedent's violation of any statutory duties could possibly have been a proximate cause of the collision.

17. Reviewing the decedent's alleged statutory violations, this court has reached the following conclusions:

(a) Speed. There is no statutory nautical speed limit applicable in this case. Article 16 of the Inland Rules of Navigation, 33 U.S.C. §192, directs a vessel to proceed at "a moderate speed," but this statute only applies to a vessel in "a fog, mist, falling snow, or heavy rainstorms." In a factually similar case, a motorboar — (17 foot, 115 H.P.) — struck a rowboat on a dark, moonless night, which rowboat was operating without lights and was standing only about two feet above the water, and the court found that the speed of the motorboat did not constitute negligence, nor was it a proximate cause of the collision. *Chimene v. Dow,* 104 F.Supp. 473 (S.D. Tex. 1952). This court is persuaded by the evidence here that the decedent was operating his boat at a medium or moderate rate of speed and that such speed, under the circumstances then prevailing, was neither excessive nor negligent, and violated no applicable statute.

(b) Outside the Channel. There is no statutory nautical rule which required the decedent to operate his boat in the deep water channel between the red can buoys on the starboard side and the black can buoys on

the port side thereof. In determining that a ship was not being operated negligently when it collided with a non-moving and anchored barge, outside the ship channel, the applicable rule has been quoted by the District Court for the Eastern District of Pennsylvania as follows:

> "I know of no rule of law which limits the navigation of a vessel to a ship channel, as a land vehicle such as an automobile would be limited to operation on a highway . . . The vessel may navigate at any part of a river containing navigable water." *American Dredging Co. v. Calmar S.S. Corp.*, 121 F.Supp. 255, 263 (E.D. Pa. 1954), *affirmed*, 218 F.2d 823 (3 Cir. 1955).

Circuit Judge Donald Russell, sitting in 1969, as a district judge, followed this principle:

> "The mere circumstance that the tug and barge were slightly west of the dredged channel is of no consequence. No rule of law required navigation in the dredged channel." *Marine Contracting and Towing Co. v. McMeekin Construction Co.*, 302 F.Supp. 804 (D.S.C. 1969).

In the *McMeekin* case, Judge Russell further footnoted, with approval, from *Jones Towing, Inc. v. United States*, 277 F.Supp. 839, at 848 (D. La. 1967):

> "A vessel is entitled to the full reach of a navigable stream available to the line of high water, including muds along the shore." *Marine Contracting, Id.* at 809, fn. 3.

Operation of the Corros boat between Daniel Island on the starboard side and buoys N-44 and R-46 on the port side during a high stage of tide was not a proximate cause or concuring cause of this collision. The draft of this boat was very shallow, and there was ample depth for such a boat, even prior to reaching the "muds along the shore." Indeed, a cautious mariner would reasonably choose to stay clear of the ship channel in busy Charleston Harbor lest he be run down by one of the numerous Navy or commercial vessels traversing said harbor.

(c) No Searchlight or Running Lights. There is no nautical statutory requirement that the decedent use a spotlight or searchlight while operating his boat at night. The Motorboat Act of 1940, 46 U.S.C. §526, *et seq.*, establishes the requirements for lights on boats like the decedent was operating. Statutorily, the decedent's boat was required to have (1) "a bright white light aft to show all around the horizon" and (2) "a combined lantern in the fore part of the vessel and lower than the white light aft, showing green to starboard and red to port . . ." When the boat is "under way . . . no other lights which may be mistaken for those prescribed shall be exhibited . . ." 46 U.S.C. §526 (b). Such required lights existed on the decedent's boat, but there is no evidence that such lights were being used a the time of the collision. However, the failure to exhibit the running lights under the facts of this case could not possibly have contributed as a proximate cause of the collision because these lights would not have served in any manner to reveal the presence of the dike. *Cf.*, 46 U.S.C. §526b (d).

While a searchlight or spotlight might seem prudent in retrospect, there is, nevertheless, no statutory requirement that such be used on a boat like Mr. Corros was operating, and the court does not feel that Mr. Corros was negligent in not having aboard and using such a light.

(d) No Lookout. Article 29 of the Inland Rules of Navigation, 33 U.S.C. §221, provides: "Nothing in these rules shall exonerate any vessel . . . from the consequences . . . of any neglect to keep a proper lookout . . ." However, a violation of the duty to keep a proper lookout is not recognized in the Fourth Circuit as a nautical statutory violation. Our Circuit's rule was enunciated in 1961 by Judge Soper:

> "In our view the violation of the duty, although a serious one, is not a statutory fault with the extreme consequences imposed by the Pennsylvania rule. The purpose of Article 29, which refers to the negligence of a vessel to keep a proper lookout, was not to make

an addition to the statutory rules of navigation theretofore set out, but to make certain that compliance with those rules would not excuse the failure of the ship to comply with the other well known rules of good seamanship which exist irrespective of statute." *Anthony v. International Paper Company*, 289 F.2d 574, at 581 (4 Cir. 1961).

In any event, the evidence persuades this court that Corros was keeping a proper lookout. One of the passengers, Pellos, testified that Corros was looking straight ahead while operating the boat:

Q. At the time the boat was heading back towards home, was Corros doing much talking at that time?

A. No. He was looking and driving. (Tr. 33).

. . . . .

Q. On the trip back . . . did you observe him moving around in the boat?

A. He was right there behind the steering wheel. (Tr. 33).

. . . . .

Q. . . . What was the position of his head while he was operating the boat?

A. He was looking forward.

. . . . . .

Q. His eyes were looking forward?

A. Yes. (Tr. 63)

(e) Without a Chart. There is no statutory mandate which requires operators of small boats to carry charts, *cf.*, 46 U.S.C. §526 (k), and courts, especially, the Fourth Circuit Court of Appeals, have held the failure to use a chart not to be negligence *per se* under general standards.

In *Lane v. United States*, 509 F.2d 175 (4 Cir. 1975), at page 180, in discussing the exact contention raised by the government here, the Court said:

"Finally, the United States contends that Lane was contributorily negligent because he did not have with

him and had not consulted the chart which had the wreck symbol on it. In some circumstances, particularly when large vessels are involved, the failure to have and to use current charts may be so obviously negligent as to require a finding to that effect. Circumstances are important, however, and consideration must be given to such things as the size of the vessel, its draft, the navigator's experience, his general familiarity with the waters, and his handling of the vessel. In a similar situation we held that experienced navigators of small boats, familiar with the waters, were not bound to notice information published in notices of the United States Lighthouse Service. *United States v. Travis*, 4 Cir., 165 F.2d 546, 548."

Since Mr. Corros was an experienced boatman, was thoroughly familiar with the waters involved, and had navigated these waters many times in the past, this court finds no statutory violation or negligence on the part of Mr. Corros, assuming *arguendo*, that he failed to consult the applicable river chart on his return trip.

18. While this court has concluded that the decedent did not commit any statutory violation that could have contributed as a proximate cause to the collision, so as to make the "Pennsylvania Rule" applicable to him, it further has concluded that the United States did not commit any statutory violations. The dike is an "obstruction" but one falling within the authority of the United States to create (33 U.S.C. §403). Thus, the liability of the parties here must be determined by the general rules of negligence.

19. The United States is charged with a duty to exercise its discretion in deciding whether to mark an obstruction, and, having made the decision to mark the dike here, it was required to do so in a manner which would not constitute an abuse of that discretion. *Ct., Indian Towing v. United States*, 350 U.S. 61 (1955). This defendant contends, since it has produced testimony from its expert, Commander William Brogdon, Jr., to

the effect that one light at the channel end of the contraction dike was sufficient, and since the Corros estate offered no rebuttal testimony, expert or otherwise, as to the type of lighting that would constitute reasonable warning of the obstruction, that the court must accept its expert testimony as conclusive on this issue. Such contention, in this court's opinion, is contrary to general evidentiary principles. Rule 702 of the Federal Rules of Evidence allows use of experts when their special knowledge or training will assist the court in understanding the evidence or in determining a fact in issue. However, it is well established that if men of ordinary knowledge are as capable of comprehending primary facts, and of drawing correct conclusions therefrom, as are "experts", such expert testimony may be properly disregarded. *Salem v. United States Lines Co.*, 370 U.S. 31 (1962). In like manner, it is the function of the finder of fact — (here, the court) — to weigh evidence, and even the testimony of expert witnesses may be disregarded if it conflicts with the sound judgment of the trial court based on its evaluation of all the evidence. *Barry v. United States*, 501 F.2d 578 (6 Cir. 1974). This is true even though an expert is not directly contradicted by a counter-expert or other direct testimony. *United States v. Coleman*, 501 F.2d 342 (10 Cir. 1974); *United States v. Collins*, 491 F.2d 1050 (5 Cir. 1974); *Hassan v. Stafford*, 472 F.2d 88 (3 Cir. 1973); *Mims v. United States*, 375 F.2d 135 (5 Cir. 1967).

In the present case, this court feels that the government expert's opinion of the sufficiency of the single light on the channel end of the 1000 foot dike, which dike at times is elevated only one to two feet above the water, is absolutely contrary to common logic and experience. Due to the color, shape, angle, appearance, and visibility of the dike in question, this court has concluded that marking it by a solitary light on its channelward end was grossly negligent and constituted a clear abuse of discretion. The court recognizes that there may be a "grey area" in which the

question of "just how many dike lights would be sufficient" should be referred to those with special expertise in the field; however, the only question here is the reasonableness of a single light, and such light is clearly, in the view of this court, insufficient to warn a mariner of the existence and location of the dike. Such conclusion is reinforced by the statement of Chief Judge Haynsworth, writing for the panel, in *Thompson v. United States*, 266 F.2d 852, 855 (4 Cir. 1959):

> "Obviously, a wreck between the channel and the shore may be effectively marked by a single red or black marker, *but obstructions in otherwise vast expanses of navigable waters, bifurcations and junctions of channels are not so easily identified.*" (emphasis added)

Recognizing that Corros knew of the existence of the dike, this court believes that additional lighting would have alerted him to its exact location in the water and avoided the tragedy that occurred.

20. The court finds that the United States negligently abused its discretion in failing to properly light the dike and that such conduct was a proximate cause of the collision and the resulting injuries to, and death of, the decedent. The United States constructs thousands of legally permissible "obstructions" in the waterways of this country, and the court takes judicial notice that the construction, marking and maintaining of water diversion dikes requires special skills. Therefore, those to whom the United States entrusts this responsibility must have special insight into the natural consequences of the failure to use due care in marking such obstructions. The Daniel Island contraction dike, by reason of its location jutting out from the island, 56° South of West, on the east side of the Cooper River, was constructed across an expanse of water used by small boaters approaching from the Wando River, around the southern tip of Daniel Island, and heading up the Cooper River. The court has concluded that the United States should have foreseen

that small boaters would be unable to see this particular dike after dark by reason of the special circumstances attendant to and surrounding its physical appearance; therefore, the United States should have taken extra care to adequately mark and/or light it. A single, white, 7 watt, flashing light on the channel end of this dike was not sufficient, in this court's opinion, to satisfy the government's duty to use due care, and the failure to install additional lighting, constituted negligence and a clear abuse of discretion.

NEGLIGENCE ON THE PART OF MR. CORROS

21. The decedent is not without fault in bringing about his own injuries and death. While this court has previously determined that he did not breach any statutory duty that could have possibly contributed as a proximate cause to the collision, such does not end the inquiry. Mr. Corros had fished in the Charleston area with his friend, William C. Johnson, Jr., over a four to five year period. Although there is no evidence that he owned a boat prior to February of the year he died, he was, nevertheless, a frequent passenger with Mr. Johnson in other small boats. There was evidence that he and Mr. Johnson had on occasion fished very near the Daniel Island contraction dike. The decedent was, therefore, very well aware of the existence of the dike and because of his familiarity with the area, this court concludes, under the comparative negligence theory applicable in admiralty jurisprudence, *United States v. Reliable Transfer*, 421 U.S. 397, 409 (1975), that the decedent's negligence contributed as a proximate cause to his fatal injuries to the extent of seventy-five per cent (75%); thus, the sum which will hereafter be determined by this court to be reasonable compensation to be paid to the third-party plaintiff arising from the death of the decedent, Mr. Corros, must be diminished by that percentage.

Consistent with the conclusions reached herein, it is ORDERED, that the third-party plaintiff have judgment against the third-party defendant, United States, in an amount to be hereafter determined by this court.

IT IS FURTHER ORDERED, that the recovery hereinabove directed in favor of the third-party plaintiff be reduced by seventy-five per cent (75%) due to the contributory negligence of the third-party plaintiff's decedent.

IT IS FURTHER ORDERED, that the third-party defendant, Exxon Corporation, have judgment in its favor.

AND IT IS SO ORDERED.

Charleston, South Carolina

October 20, 1977

/s/ Sol Blatt, Jr.

UNITED STATES DISTRICT JUDGE

STATUTES

SUITS IN ADMIRALTY ACT
Title 46

§ 742. Libel in personam (in part)

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . .

THE COAST GUARD
Title 14

§2. Primary duties (in part)

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on and under the high seas and waters subject to the jurisdiction of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; . . . .

§ 81. Aids to navigation authorized (in part)

In order to aid navigation and to prevent disasters, collisions, and wrecks of vessels and aircraft, the Coast Guard may establish, maintain, and operate:

(1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States; . . . .

§ 86. (1965) Marking of obstructions

The Secretary may mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters or waters above the continental shelf of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require. The owner of such an obstruction shall be liable to the United States for the cost of such marking until such time as the obstruction is removed or its abandonment legally established or until such earlier time as the Secretary may determine. All moneys received by the United States from the owners of obstructions, in accordance with this section, shall be covered into the Treasury of the United States as miscellaneous receipts. This section shall not be construed so as to relieve the owner of any such obstruction from the duty and responsibility suitably to mark the same and remove it as required by law. 79 Stat. 822.

§ 86. (1949) Marking of obstructions

The Coast Guard may mark for the protection of navigation any sunken vessel or other similar obstruction existing on any navigable waters of the United States, whenever the owner thereof has, in the judgment of the Coast Guard, failed to suitably to mark the same in accordance with the provisions of section 409 of Title 33. Until the abandonment of any such obstruction has been established in accordance with the provisions of section 414 of Title 33, the owner thereof shall pay to the Coast Guard the cost of such marking. As soon as the abandonment of any such obstruction has been so established, the Secretary of the Army shall keep the same so marked pending removal thereof in accordance with the provisions of section 414 of Title 33, but the Coast Guard may at the request of the Department of the Army continue the suitable marking of any such obstruction for and on behalf of that

Department; and the cost of any such marking shall be borne by the Department of the Army. All monies received by the Coast Guard from the owners of obstructions, in accordance with the provisions of this section, shall be covered into the Treasury of the United States as miscellaneous receipts. No provision of this section shall be construed so as to relieve the owner of any such obstruction from the duty and responsibility suitably to mark the same in accordance with the provisions of section 409 of Title 33. 63 Stat. 501.

United States Court of Appeals
For the Fourth Circuit

No. 78-1175

Helen Louise Bowling Corros,
etc.,

Appellee,,

v.

The United States of America,

Appellant.

ORDER

Upon consideration of the appellee's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Bryan with the concurrence of Judge Widener and Judge Murnaghan.

October 22, 1980 For the Court,

/s/ William K. Slate, II, Clerk

No. 80-1376

APR 7 19
ALEXANDER L. ST
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

HELEN LOUISE BOWLING CORROS, ADMINISTRATRIX OF THE ESTATE OF RICARDO ABELLO CORROS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

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HELEN LOUISE BOWLING CORROS, ADMINISTRATRIX OF THE ESTATE OF RICARDO ABELLO CORROS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the United States may be held liable under the Suits in Admiralty Act for the Coast Guard's discretionary decision not to establish a particular aid to maritime navigation.[1]

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[1]There is a question whether the petition for a writ of certiorari was timely filed. The petition in this case was filed on January 21, 1981, one day after the filing deadline, apparently on the advice of an employee of the Office of the Clerk of this Court that January 20, 1981 (Inauguration Day) was a federal legal holiday and as such tolled the deadline for filing, pursuant to Rule 29.1 of the Rules of this Court. While there appears to be no clear authority concerning the status of Inauguration Day as a federal legal holiday for purposes of Rule 29.1 (see R. Stern & E. Gressman, *Supreme Court Practice* 385 n.1 (5th ed. 1978)), Inauguration Day is a "legal public holiday for the purpose of statutes relating to pay and leave" of federal employees who are employed in the Washington, D.C., metropolitan area. 5 U.S.C. 6103(c). In any event, even if the petition was timely filed, as we demonstrate below, the question presented does not warrant review by this Court.

1. Petitioner Helen Louise Bowling Corros is the representative of the estate of Ricardo Corros, who died of injuries received when the motorboat he was operating collided with a sheet steel dike during a pleasure trip on the Cooper and Wando Rivers in Charleston, South Carolina. At approximately 8:00 p.m. on September 29, 1973, the decedent and two passengers were returning from a day of fishing when the boat ran virtually head-on into the Daniel Island contraction dike, at a point about 280 feet from the dike's channelward end. All three occupants of the boat were thrown into the water, and all were injured. Corros died of his injuries five days later (Pet. App. A-4 to A-5, A-14 to A-15).

The Daniel Island contraction dike was built pursuant to congressional authorization[2] for the purpose of increasing the water velocity in the Cooper River channel and thereby to reduce shoaling in that channel caused by siltation resulting from certain upstream activities conducted by the State of South Carolina (Pet. App. A-5, A-15 to A-16). The dike was completed in February 1959. From the Daniel Island shoreline, it runs 1,100 feet to the southwest. The first 100 feet is a rubble mound anchoring the shoreward end of a 1000-foot long sheet steel pile wall. The channelward end is anchored by a terminal cell, a sheet steel pile cylinder 23 feet in diameter filled with crushed rock. The top of the terminal cell and the top of the pile wall are elevated about nine feet above mean low water (*id.* at A-5, A-16). Given the likely condition of the tides at the time of the collision, the wall of the dike was about two feet above the water's surface and was probably not visible to an approaching boatman (*ibid.*).

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[2]See the River and Harbor Act of 1954, ch. 1264, Section 101, 68 Stat. 1250, amending the River and Harbor Act of 1940, ch. 895, Section 1, 54 Stat. 1199.

At the channel end of the dike is Cooper River Dike Light 46-A, a fifteen foot high fixed tower structure supporting an all-around white light that flashes every four seconds (Pet. App. A-5, A-16). It is the only light on the dike and is designed to mark both the channel's eastern boundary and the end of the dike. Light 46-A complies with the lateral buoyage system of the United States and correctly marks the channel and the channel user's way around the dike. On board the decedent's boat was a chart of the river that showed the position of the dike with the light at its channel end. The light was functioning properly at all pertinent times (*id.* at A-4 to A-5).

One of the injured passengers brought suit against the decedent's estate in the United States District Court for the District of South Carolina under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.* (SIAA). The estate, as third party plaintiff, impleaded the United States. After a trial, the district court determined, under a comparative negligence approach, that (i) the decedent was 75% negligent based on his failure to avoid the collision despite his familiarity with the area near the dike, and (ii) the United States was 25% negligent in failing properly to light or otherwise mark the dike (Pet. App. A-13 to A-35). The court found the government partially liable on the ground that "the United States should have foreseen that small boaters would be unable to see this particular dike after dark" and concluded that the government's failure to install additional lighting "constituted negligence and a clear abuse of discretion" (*id.* at A-33 to A-34).

The court of appeals reversed that part of the district court's judgment that found the government partially liable (Pet. App. A-3 to A-11). The court of appeals ruled that the government was under no duty to provide additional lighting on the dike (*id.* at A-4; see *id.* at A-9). In addition, the court held that the government in undertaking to light the

dike did not do so negligently: "the Coast Guard undertook only to light the channel end of the dike with a light, and at no time did it fail to perform that undertaking" (*id.* at A-10).

2. The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

a. Petitioner contends (Pet. 6-8) that the court of appeals erred in concluding (Pet. App. A-8) that 14 U.S.C. 86,[3] which authorizes the Coast Guard to mark obstructions on navigable waters, was inapplicable to the dike involved in this case. This contention is without merit.

The dike was built pursuant to 14 U.S.C. 81 as an aid to navigation and is therefore not classifiable under 14 U.S.C. 86 as an "obstruction." Cf. *Chute* v. *United States*, 610 F. 2d 7, 10-11 (1st Cir. 1979), cert. denied, 446 U.S. 936 (1980). Congress has the power under the Commerce Clause "to block navigation at one place to foster it at another." *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 393 (1945) (footnote omitted). This is a plenary power of Congress "to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage." *South Carolina* v. *Georgia*, 93 U.S. 4, 11-12 (1876). Hence, as the court of appeals concluded, 14 U.S.C. 86 "is inapplicable to a structure such

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[3] 14 U.S.C. 86 provides in pertinent part that the Secretary of Transporation

> may mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters * * * of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require.

as the dike in this case which was constructed for a proper governmental purpose" (Pet. App. A-8).

In any event, even if 14 U.S.C. 86 applies, the United States is not liable because it breached no duty to petitioner in its marking of the dike. Liability in tort can be found only if the alleged torteasor breached a duty of care to the injured party and if the breach of duty proximately caused the injury. As the court of appeals observed, petitioner "has presented us with no authority and has introduced no evidence that would impose upon anyone a duty to mark the dike any more clearly than the United States did in this case" (Pet. App. A-9). The court's ruling is in harmony with those of other courts of appeals on this issue. See *Bearce* v. *United States*, 614 F. 2d 556 (7th Cir.), cert. denied, No. 79-1961 (Oct. 6, 1980);[4] *Chute* v. *United States, supra.*

b. Petitioner argues (Pet. 8-12) that the decision of the court of appeals is in conflict with *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), where this Court stated that "one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." *Id.* at 64-65. Petitioner's reliance on *Indian Towing* is entirely misplaced.

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[4]As the court of appeals acknowledged (Pet. App. A-11 n.9), the Seventh Circuit in *Bearce* exonerated the United States on facts virtually indistiguishable from this case by construing the SIAA to include a "discretionary function" exception identical to that contained in the Federal Tort Claims Act. Other courts of appeals have agreed that the SIAA contains a discretionary function exception. See *Canadian Transport Co.* v. *United States*, No. 77-1693 (D.C. Cir. Sept. 5, 1980); *Gercey* v. *United States*, 540 F. 2d 536 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977). The discretionary function exception would similarly bar petitioner's claim here.

While the Fourth Circuit has declined to adopt the discretionary function exception in SIAA cases, its opinion here reflects that, as a practical matter, its approach will generally yield results compatible with *Bearce*. At all events, since petitioner could not benefit from the discretionary function issue, there is no occasion to consider that issue in the context of this case.

Indian Towing teaches that the government may be held liable for negligence if it induces reliance on a warning device and then fails to maintain it properly. But here, petitioner's only complaint (Pet. 11) is that the Coast Guard failed to *undertake* a service—*i.e.*, the placement of additional lights or marking devices on the dike. There is no question that the existing light was properly constructed, sited, and functioning on the night of the collision. Under *Indian Towing*, therefore, it is clear that petitioner's complaint does not state a claim upon which relief can be granted. As mentioned above, Congress has not imposed on the Coast Guard a mandatory duty to establish aids to navigation. The mere fact that the Coast Guard has legal authority to erect additional navigational aids did not result in a duty to petitioner's decedent upon which a claim for damages may be founded.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

DOJ-1981-04